



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: H.A. Ekelin & Associates
File: B-228972
Date: October 5, 1987

DIGEST

1. Protest filed with the General Accounting Office more than 10 working days after initial adverse action by the contracting agency on protest filed with it is untimely. Protester's continued pursuit of protest with contracting agency does not change this result.
2. Protest to the General Accounting Office is untimely where the protester knew its basis for protest more than 10 working days prior to filing its initial protest with the agency, notwithstanding agency's consideration of protest on its merits.

DECISION

H.A. Ekelin & Associates protests the award of a contract under request for proposals (RFP) No. DACA05-85-R-0247 issued by the U. S. Army Corps of Engineers. Ekelin contends that the Army did not evaluate proposals in accordance with the evaluation criteria stated in the RFP. We dismiss the protest as untimely.

By letter dated April 17, 1986, Ekelin protested the award to the Army. The Army denied the protest in a letter on August 29, 1986. Ekelin continued to pursue its protest with the Army, and received further denials on September 23, 1986; October 17, 1986; November 13, 1986; May 7, 1987; May 26, 1987 and August 13, 1987.

Ekelin filed its protest with our Office on September 1, 1987. The protester claims that its protest is timely because it was filed within 10 days of receipt of the Army's August 13 letter, which informed Ekelin of its right under 4 C.F.R. § 21.1(b) (1987) to protest to us within 10 days from the date Ekelin received the August 13 letter.

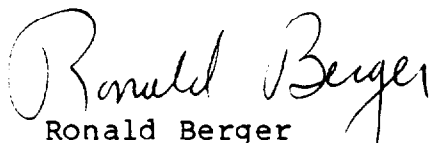
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If a protest is filed initially with the agency, the subsequent protest filed here must meet two tests to be timely: (1) it must be filed within 10 days of the protester's learning of the adverse action on the protest filed with the agency, and (2) the initial protest itself must have been timely filed. 4 C.F.R. § 21.2(a)(3). Ekelin's protest meets neither of the two tests.

Here, initial adverse action occurred on August 29, 1986, when the Army first denied Ekelin's protest. Ekelin's decision to continue to pursue the protest at the agency for almost another year and the Army's subsequent denials of the protest did not toll the period for filing in our Office. Dock Express Contractors, Inc.--Request for Reconsideration, B-223966.2, Mar. 4, 1987, 87-1 CPD ¶ 243; Scientific Instrument Center, Inc., B-223429, Aug. 21, 1986, 86-2 CPD ¶ 210. Although the Army did not advise Ekelin of its protest rights under our Bid Protest Regulations until its August 13, 1987 letter, Ekelin was charged with constructive notice of our regulations because they are published in the Federal Register. Sharon R. Riffe-Cobb--Request for Reconsideration, B-223194.2, B-223195.2, June 25, 1986, 86-2 CPD ¶ 9.

Furthermore, Ekelin did not timely file its initial protest with the Army. Ekelin states that it learned of its basis for protest at a debriefing held by the Army on March 6, 1986. It did not file its agency protest until April 17, 1986. We note that although Ekelin diligently pursued a Freedom of Information Act (FOIA) request after the debriefing, the protest was based not on information requested under FOIA, but on information received at the March 6 debriefing, and therefore the protest was not filed within the 10 working days required by our regulations. The fact that the Army considered and responded to Ekelin's agency-level protest is irrelevant, since an agency may not waive the timeliness requirements of our Bid Protest Regulations. Unicom System, Inc., B-222601.4, Sept. 15, 1986, 86-2 CPD ¶ 297.

The protest is dismissed.


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General Counsel